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Supreme Court, U.S.
FILED
MAR 22 1996
CLERK

No. 95-803

In the Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM C. BLACK, JR., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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24 pp

QUESTIONS PRESENTED

1. Whether the United States may assert the state secrets privilege to prevent discovery of information sought by plaintiff to support constitutional tort claims asserted under *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

2. Whether dismissal of this action was appropriate where, in the absence of information protected by the state secrets privilege, the plaintiffs could not survive summary judgment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 62 F.3d 1115. The pertinent opinion of the district court (Pet. App. 25a-54a) is reported at 900 F. Supp. 1129. An earlier opinion of the district court (Pet. App. 55a-95a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 1995. The petition for a writ of certiorari was filed on November 13, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is an electrical engineer who, since 1978, has worked in the field of integrated circuit design. Pet. App. 100a (¶ 8). During the 1980s he worked on military-related projects for various defense contractors. *Id.* at 100a-101a (¶¶ 8-9). In connection with his defense contract work, petitioner alleges that he held a security clearance until August of 1987. *Id.* at 102a (¶ 10).

In 1984, petitioner began teaching technical courses on integrated circuit design in the United States, Europe and Asia. Pet. App. 102a (¶ 11). In November, 1986, petitioner lectured at the Swiss Federal Institute of Technology in Zurich, Switzerland. *Ibid.* He alleges that he shared an office there with a Soviet mathematician who asked him "intrusive" questions about "his personal life and business, including about the security of his office at home." *Id.* at 102a-103a (¶¶ 11, 12). The Soviet mathematician also "repeatedly asked to see [petitioner's] airplane ticket." *Id.* at 103a (¶ 12). Petitioner states that he reported his contact with the Soviet mathematician to the United States Consulate in Zurich, and that he later met with Lynn Levenson, an official stationed at the United States embassy in Bern. *Id.* at 103a-104a (¶ 13). He claims to have met with Levenson at her request several more times during his next visit to Switzerland. *Id.* at 104a (¶ 13).

Petitioner alleges that in January, 1987, after he returned to his home in Minnesota, respondent Olin Peter Nielson requested a meeting with him and that Nielson identified himself as an employee of the Central Intelligence Agency (CIA). Pet. App. 104a

(¶ 14). Nielson allegedly questioned petitioner about both Eastern Bloc and American colleagues at the Zurich Institute and about petitioner's future travel plans. *Ibid.* Petitioner states that, at Nielson's request, he met with Lynn Levenson in April, 1987, during a trip to Switzerland, and that Levenson questioned petitioner about the Institute and about his activities and associates. *Id.* at 105a-106a (¶ 16).

Petitioner alleges that in July, 1987, after he returned to the United States, he was again contacted by Nielson, who told him that "people from Washington" wanted to talk to him. Pet. App. 106a (¶ 17). Petitioner alleges he met with Nielson and two other individuals who, he claims, also stated they were CIA employees. The three questioned him about his work in Switzerland, the Soviet mathematician and another Soviet scientist. *Id.* at 106a-107a (¶ 18).

Petitioner asserts that he cooperated with the alleged CIA contacts and questioning because he thought his security clearance required such cooperation, Pet. App. 105a (¶ 15), but that he believed that when his clearance expired in August, 1987, he was no longer required to provide information to the CIA, and thereafter did not report his travel activities or associations to the government officials, *id.* at 107a-108a (¶¶ 19-20). Petitioner alleges that, in 1987 and 1988, after he stopped providing information to officials of the CIA, and because of his refusal to continue that cooperation, he became the subject of a "campaign of harassment and psychological attacks" by employees of the CIA, the FBI and the Department of State. *Id.* at 108a (¶ 21), 113a-116a (¶¶ 28-29).

Petitioner alleges that government officials entered his apartment and office and, among other things, "rearranged" or moved his personal items.

Pet. App. 108a-109a (¶ 21), 115a (¶ 29). He asserts that "shortly after a colleague mentioned that 'bugging devices' are easily sewn into carpet and furniture," he noticed that "patterns of sloppy, monofilament stitching appeared several times in [petitioner's] living room carpet." *Id.* at 108a-109a (¶ 21). Soon after a new neighbor moved in, petitioner claims that he heard "loud sounds of shaking and rolling dice" from the neighboring apartment when he entered or left his own apartment. *Id.* at 109a (¶ 22). He also alleges that he received "strange telephone calls," that "false fire alarms began occurring, typically in the early morning hours," and that he was "overtly followed." *Ibid.*

Petitioner alleges that on February 4, 1988, at Nielson's request, petitioner met again with Nielson and three other individuals because "[h]e feared that there would be serious consequences for him if he refused" to meet. Pet. App. 111a (¶ 25). He alleges that, at the meeting and in subsequent phone conversations, Nielson made remarks that petitioner perceived as threatening. *Id.* at 111a-113a (¶¶ 25-27).

Petitioner alleges that these and similar types of harassment continued into 1990. Pet. App. 118a-119a (¶ 35), 120a-124a (¶¶ 38-43). Petitioner claims that, as a result, he suffered severe physical and emotional distress, was forced to seek psychiatric help and to commit himself to a mental health institution. *Id.* at 116a (¶ 30), 124a-125a (¶¶ 44-46).

2. On September 15, 1992, petitioner filed suit against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, alleging: (1) that the government breached a duty owed to him to obtain informed consent before using him as an informant or as a "subject of experimental research";

(2) that government officials committed assault and battery against him; and (3) that the alleged conduct of government officials resulted in the intentional infliction of emotional distress. Pet. App. 5a-6a. In addition, petitioner sued Nielson and ten unknown individual officials of the CIA, FBI and Department of Justice and Department of Defense in their individual capacities under *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), alleging that they had violated his Fourth Amendment rights. Pet. App. 5a-7a.

On the government's motion to dismiss the FTCA counts, the district court ruled that petitioner failed to state a claim of negligence because, under Minnesota law, petitioner is not owed any special duty of care in connection with a security clearance or "experimental research." Pet. App. 76a-79a.[1] In addition, the district court dismissed petitioner's assault and battery claims on the grounds that (1) officials of the CIA are not law enforcement officers within the meaning of the proviso to the intentional tort exception in the FTCA, *id.* at 84a-86a, and (2) the only act alleged within the two-year limitations period prior to petitioner's administrative claim was a break-in at his office—an act that does not constitute an assault or battery, *id.* at 89a-91a.[2]

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[1] Under the FTCA, the law of the place where the alleged tortious conduct occurs provides the basis for the cause of action. 28 U.S.C. 1346(b); see *Butts Feed Lots, Inc.* v. *United States*, 690 F.2d 669, 670 (8th Cir. 1982). The standard governing petitioner's negligence claim is thus provided by the law of Minnesota, where petitioner resided and had his office and where most of the alleged tortious conduct occurred.

[2] The FTCA generally does not waive sovereign immunity from claims arising out of assault and battery. 28 U.S.C.

The court held that petitioner had stated sufficient facts to survive a motion to dismiss his claim of intentional infliction of emotional distress, and that, based on a continuing tort theory, the claim was timely. Pet. App. 91a-94a. The court directed petitioner to file an amended complaint with respect to that count, to allege additional facts within the relevant limitations period, and to identify any facts outside the limitations period that might support his allegation of "extreme and outrageous" conduct. *Id.* at 92a-94a & n.10.[3]

Petitioner thereafter filed an amended complaint alleging additional conduct that occurred after Jan-

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2680(h). However, it does waive sovereign immunity for assault and battery claims arising out of acts or omissions of "investigative or law enforcement officers of the United States Government." *Ibid.* The statute defines an investigative or law enforcement officer as any "officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Ibid.*

As the district court noted (Pet. App. 84a), the organic statute of the CIA "specifically provides that the CIA does not have law enforcement powers." 50 U.S.C. 403(d)(3) (1988) (recodified at 50 U.S.C. 403-3(d)(1) (Supp. V 1993)). In addition, Section 2.4 of Executive Order No. 12,333, 3 C.F.R. 212 (1981), generally prohibits the CIA from engaging in electronic surveillance or unconsented searches in the United States. However, because petitioner also alleged that agents of the FBI, who are law enforcement officials within the FTCA proviso, were part of the campaign to harass him, the court addressed the statute of limitations defense as to the assault and battery charge.

[3] The district court dismissed the Departments of State and Defense because petitioner failed to meet the jurisdictional requirement under the FTCA that he first file administrative claims with those Departments. Pet. App. 68a n.4, 88a; see 28 U.S.C. 2675(a).

uary 6, 1990. See Pet. App. 121a-124a (¶¶ 39-43). The amended complaint asserted only claims of intentional infliction of emotional distress under the FTCA, and *Bivens* claims against the individual officials. *Id.* at 126a-131a (¶¶ 49-58).

The United States then filed a public declaration of R. James Woolsey, Director of Central Intelligence and head of the CIA. C.A. App. 70-72. Director Woolsey stated that he had concluded that confirmation or denial of certain information necessary to answer the complaint and respond to discovery requests "would be damaging to the national security interests of the United States." *Id.* at 71. After personally considering the information at issue and the nature of petitioner's claims, Director Woolsey asserted a formal claim of state secrets privilege over information that would tend either to confirm or deny petitioner's "alleged contacts with officers of the United States government, including the identities of the government entities and individuals involved, the nature and purpose of the contacts, and the locations of those contacts." *Id.* at 71-72. In addition to his public declaration, the Director proffered *in camera* classified *ex parte* declarations further explaining the reasons for the privilege.[4]

Recognizing that petitioner's need for the information claimed to be privileged was compelling, the trial court directed the government to submit the classified declarations for its *ex parte* review. Pet. App. 35a & n.5. Based on the classified declarations and the

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[4] The classified declarations are being maintained by the government in a secure facility and will be produced for the Court's review upon request and under appropriate security procedures.

public declaration of Director Woolsey, the court held that the state secrets privilege had been properly asserted. *Id.* at 36a-38a.

The court observed that the government had satisfied the requirements for assertion of the privilege articulated by this Court in *United States* v. *Reynolds*, 345 U.S. 1, 7-8 (1953): The privilege had been (1) formally asserted in a declaration (2) by the head of the agency that has control over the privileged matter—*i.e.*, by R. James Woolsey, Director of Central Intelligence and head of the CIA, (3) after his personal consideration of the matters. Pet. App. 33a-34a. Specifically, the court ruled:

> that Director Woolsey properly invoked the state secrets privilege, since disclosure of information concerning the identities of government agents, the nature and purposes of their contacts, if any, with Black, or the locations of those contacts would pose a "reasonable danger" to the United States' intelligence-gathering capabilities and diplomatic relations. *See Zuckerbraun* v. *General Dynamics Corp.*, 935 F.2d 544, 547 (2d Cir. 1991). Specifically, confirming or denying Black's allegations that he was contacted by agents of the CIA would provide foreign intelligence analysts with information concerning this nation's intelligence priorities and procedures. *Halkin* v. *Helms*, 690 F.2d 977, 993 (D.C. Cir. 1982) ("*Halkin II*"). In addition, the government's intelligence relationships with other countries could be put at risk, either by requiring the United States to confirm or deny that it (a) conducts intelligence operations in those countries, and (b) has targeted locations in those

> countries as sources of intelligence. *Id.* The same conclusion holds for requiring the United States to release information concerning those topics during discovery—indeed, discovery could present even greater threats to the government's intelligence activities, since discovery would require the government to disclose *specific facts* concerning those subjects.

Id. at 36a-38a.

The court rejected petitioner's contentions that the privilege had been waived by disclosures under the Freedom of Information Act, or that it should be narrowly construed when an intentional tort is alleged. Pet. App. 38a n.7 (citing *In re Under Seal*, 945 F.2d 1285 (4th Cir. 1991); *Farnsworth Cannon, Inc.* v. *Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (en banc); *Maxwell* v. *First National Bank of Maryland*, 143 F.R.D. 590 (D. Md. 1992), aff'd, 998 F.2d 1009 (4th Cir. 1993) (Table), cert. denied, 114 S. Ct. 920 (1994)). The court also rejected petitioner's contention that the privilege was unavailable to shield allegedly illegal conduct by the government, stating that "the government's submissions in support of the privilege establish that it is being asserted in the interest of national security, and not to hide illegal acts." Pet. App. 38a n.7. The court thus concluded that information concerning "the identities of any government agents who may have contacted Black, the nature and purposes of those contacts" is "*absolutely* privileged from confirmation or denial in a responsive pleading and discovery." *Id.* at 38a.

The court then considered whether and how the case could proceed without the privileged evidence. Pet. App. 42a-53a. It noted that the effect of the privil-

ege is completely to remove the privileged information from the case. *Id.* at 42a. It also observed, however, that dismissal of claims "should be invoked '[o]nly when no amount of effort and care on the part of the court and the parties will safeguard [the] privileged material.'" *Id.* at 44a (quoting *Fitzgerald* v. *Penthouse International, Ltd.*, 776 F.2d 1236, 1243-1244 (4th Cir. 1985)).

Applying this standard, the court held that both claims must be dismissed.[5] Regarding the claim of intentional infliction of emotional distress, the court noted that petitioner lacked evidence that the persons who engaged in the alleged tortious conduct were government employees. The identities and government employment, if any, of the individuals named in the complaint are subject to the privilege. Moreover, the court observed that petitioner could not prove the factual allegations of the complaint and, in particular, the alleged continuing contacts between petitioner and government officials, because those allegations "are so tied to the privileged information that further litigation will constitute an undue threat that privileged information will be disclosed." Pet. App. 46a-47a. The court concluded that petitioner could not proceed with his *Bivens* claims because of the privileged nature of information needed to prove those claims, *i.e.*, the identities of the alleged wrongdoers, their relationship to the government, and their contacts with petitioner. *Id.* at 50a-52a.

The court rejected petitioner's contention that the trial could proceed *in camera*, concluding that such a

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[5] Because it considered matters outside the pleadings, the court treated the motion as one for summary judgment. Pet. App. 40a-42a.

procedure was not a reasonable alternative in this case. Pet. App. 46a n.11. That decision followed in part from the court's conclusion that it would be inappropriate for petitioner or his counsel to participate in an *in camera* examination of privileged material, notwithstanding that they may have been granted security clearances in connection with other responsibilities. *Id.* at 35a n.6. The court also rejected petitioner's contention that recognition of the privilege would be unduly harsh and unfair:

> When the state secrets privilege is validly asserted, the result is unfairness to individual litigants—through the loss of important evidence or dismissal of a case—in order to protect a greater public value.

Id. at 49a n.12 (quoting *Fitzgerald*, 776 F.2d at 1238 n.3).

3. The court of appeals affirmed. The court held that the privilege applies to information that, if disclosed, would impair defense capabilities, reveal intelligence sources and methods, disrupt diplomatic relations with foreign governments or harm the national security. Pet. App. 13a (citing *Ellsberg* v. *Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983), cert. denied, 465 U.S. 1038 (1984), and *Zuckerbraun* v. *General Dynamics Corp.*, 935 F.2d 544, 546 (2d Cir. 1991)). Recognizing that the roots of the privilege are more than a century old, the court rejected petitioner's contention that the privilege is a "'creature' of the Cold War," and thus obsolete. Pet. App. 14a-15a & n.4. The court of appeals noted that international destabilization since the collapse of the Soviet Union may make the privilege "all the more important." *Id.* at 15a.

The court of appeals reviewed *in camera* and *ex parte* the classified declarations supporting the claim of privilege. Pet. App. 18a-19a. Based on that review and the information in the public record, the court concluded that the government's assertion of the privilege "was not overbroad." *Id.* at 19a. The court held that "[t]he information covered by the privilege is at the core of Black's claims, and we are satisfied that the litigation cannot be tailored to accommodate the loss of the privileged information." *Ibid.*

The court of appeals also rejected petitioner's contention that the CIA was engaged in *ultra vires* conduct, *i.e.*, domestic surveillance, and was thus precluded from asserting the state secrets privilege. The court held that, "[i]f [petitioner] is correct about CIA surveillance of him, and we assume *arguendo* that he is, his reported contact with a suspicious foreign national outside the United States places the matter in the arena of foreign activity and thus within the CIA's competence." Pet. App. 21a-22a. Alternatively, assuming that the FBI was responsible for the alleged domestic surveillance, "no case has been made out for *ultra vires* activity" because domestic surveillance is within the FBI's mission. *Id.* at 22a. In view of all the available evidence, the court concluded that "*if* any activities were conducted by the government in connection with Black, they were not *ultra vires*." *Id.* at 23a.[6]

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[6] The court of appeals also sustained the district court's dismissal of the Departments of State and Defense as defendants. The court held that application of the state secrets privilege moots the issue.

ARGUMENT

1. The doctrine of state secrets bars litigants from discovering or utilizing at trial information the disclosure of which would be contrary to national security. See, *e.g.*, *Totten* v. *United States*, 92 U.S. 105 (1876); *United States* v. *Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d). "The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." *Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980) (per curiam). The privilege may be invoked by the head of a governmental department with responsibility over the matter in question, and the department head must have personally considered the matter. See *United States* v. *Reynolds*, 345 U.S. 1, 7-8 (1953).

Petitioner does not dispute that the government has satisfied the formal requisites for the assertion of the state secrets privilege. Petitioner bases his argument in this Court on the fact that the privilege has been asserted in a case in which he has alleged a constitutional tort as well as a claim under the Federal Tort Claims Act. He notes that the only occasion on which this Court has addressed the state secrets privilege, *United States* v. *Reynolds*, *supra*, involved a common-law tort claim under the FTCA, which occurred during a time of national defense buildup. Petitioner contends that *Reynolds* cannot apply where the claim rests on a constitutional violation.

The state secrets privilege is not limited to FTCA cases. See, *e.g.*, *Ellsberg* v. *Mitchell*, 709 F.2d 51 (D.C. Cir. 1983) (applying state secrets privilege to Fourth

Amendment *Bivens* claim), cert. denied, 465 U.S. 1038 (1984). It is the nature of the information sought to be protected, not the nature of the litigation in which the privilege is asserted, that determines whether the privilege is appropriate. The privilege is recognized in order to protect the national interest in safeguarding United States defense capabilities and diplomatic relations. It applies to prevent disclosure of national-security information where revealing the information would result in "impairment of the nation's defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments." *Ellsberg*, 709 F.2d at 57. The state secrets privilege thus applies without regard to the kind of case or theory of recovery for which the information is sought.

Once the court is satisfied that the privilege is correctly asserted, "even the most compelling necessity cannot overcome the claim of privilege." *Reynolds*, 345 U.S. at 11. "When properly invoked, the state secrets privilege is absolute. No competing public or private interest can be advanced to compel disclosure of information found to be protected by a claim of privilege." *Ellsberg* v. *Mitchell*, 709 F.2d at 57 (footnote omitted); *In re United States*, 872 F.2d 472, 476 (D.C. Cir.), cert. dismissed *sub nom. United States* v. *Albertson*, 493 U.S. 960 (1989); accord *In re Under Seal*, 945 F.2d 1285, 1288 (4th Cir. 1991); *Zuckerbraun* v. *General Dynamics Corp.*, 935 F.2d 544, 546-547 (2d Cir. 1991). Thus, if the court is satisfied that state secrets are at stake, an individual litigant must bear the "burden of protection of a public value." *Fitzgerald*, 776 F.2d at 1238 n.3. The

principles articulated by the Court in *Reynolds* have become well-settled in the lower courts.[7]

Petitioner contends (Pet. 25) that the *in camera* presentation of the basis for the claim of privilege in this case was given "uncritical acceptance by the judiciary." Those courts, however, each carefully examined the claim of privilege and the context in which it arose. Both courts closely examined the nature of petitioner's claims, and the relationship between those claims and the privileged information. Both conducted an *in camera, ex parte* review of the classified affidavits detailing the need for the privilege. Both were satisfied that the privilege was properly asserted, and that the case could not proceed without the privileged information.

Information concerning intelligence sources and methods would be exposed if the United States were compelled to admit or deny the averments in the amended complaint that allege contacts with intelligence officials of the United States. Such exposure would also occur if the United States were required to respond to discovery requests and offer proof in its defense at trial. The claim of privilege filed by the Director of Central Intelligence asserts a public interest in protecting such sensitive information from disclosure in this litigation. Director of Central Intelligence Woolsey concluded

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[7] See, *e.g., Zuckerbraun, supra*; *Clift* v. *United States*, 597 F.2d 826 (2d Cir. 1979); *Patterson by Patterson* v. *FBI*, 893 F.2d 595 (3d Cir.), cert. denied, 498 U.S. 812 (1990); *Fitzgerald, supra*; *Farnsworth Cannon, supra*; *Maxwell, supra*; *Bareford* v. *General Dynamics Corp.*, 973 F.2d 1138 (5th Cir. 1992), cert. denied, 507 U.S. 1029 (1993); *Molerio* v. *FBI*, 749 F.2d 815 (D.C. Cir. 1984); *Ellsberg, supra*; *Guong* v. *United States*, 860 F.2d 1063 (Fed. Cir. 1988), cert. denied, 490 U.S. 1023 (1989).

> that any details about [petitioner's] alleged contacts with officers of the United States government, including the identities of the government entities and individuals involved, the nature and purpose of the contacts, and the locations of those contacts should be, in the national interest, absolutely privileged from confirmation or denial. I have determined that the disclosure of these matters in this litigation, or otherwise, reasonably could be expected to cause serious damage to the national security.

C.A. App. 72 (¶ 5).[8]

2. Once the district court had concluded that the state secrets privilege was applicable in this case, it decided not only to prohibit discovery, but also to dismiss petitioner's action. "Once invoked, the effect of the privilege is to exclude the evidence from the

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[8] After he filed his Petition for Writ of Certiorari, petitioner by letter to the Solicitor General raised a question whether the information at issue must remain privileged in light of "recent disclosures" by the Assassination Records Review Board (Kennedy Assassination) of FBI documents concerning its investigation of Lee Harvey Oswald while he was in the Soviet Union in 1960 and 1961. Those documents contained some information provided by the Swiss government. Petitioner surmises that the claim of privilege here has been asserted to protect U.S. intelligence-gathering activities in Switzerland and relations with the Swiss government—matters that, in petitioner's view, have now been disclosed.

The events involved in petitioner's case concern a time period considerably later than that involved in the Kennedy assassination. See *Fitzgibbon* v. *CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990). The Director of Central Intelligence has considered petitioner's contention and reaffirms the continuing need to protect the information covered by the assertion of privilege in this case.

case." *Zuckerbraun* v. *General Dynamics Corp.*, 935 F.2d at 546; accord *Bareford* v. *General Dynamics Corp.*, 973 F.2d 1138, 1141 (5th Cir. 1992), cert. denied, 507 U.S. 1029 (1993); *Ellsberg*, 709 F.2d at 65. Without evidence regarding the relationship, if any, between the individual defendants and the government, petitioner's claims could not survive summary judgment. It is well established that the dismissal of a case is appropriate if the plaintiff cannot prevail, or even make out a prima facie case, without disclosing privileged information. As this Court held in *Weinberger* v. *Catholic Action of Hawaii*:

> public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated.

454 U.S. 139, 146-147 (1981) (quoting *Totten* v. *United States*, 92 U.S. at 107).[9] Courts have consistently held

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[9] Petitioner observes (Pet. 20) that *Totten* "does not relate to a state secrets evidentiary privilege." The broader principle upon which *Totten* rests is that, where litigation would require disclosure of information that has been determined to be confidential, no action can be maintained. The Court noted in *Totten* that "suits cannot be maintained which would require a disclosure of the confidences" protected by such privileges as attorney-client, husband-wife and physician-patient, and concluded that "[m]uch greater reason exists for the application of the principle to cases of contract for secret services with the government." *Totten*, 92 U.S. at 107.

Petitioner also attempts to distinguish *United States* v. *Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d), a criminal case. While *Burr* did not rest on an assertion of the state secrets privilege, Chief Justice Marshall recognized "[t]hat

that where, as here, a claim cannot be made out in the absence of information covered by the state secrets privilege and the litigation cannot be tailored to protect the privilege, dismissal of the claims is the appropriate course. See, *e.g.*, *In re Under Seal*, 945 F.2d at 1286, 1290; *Zuckerbraun*, 935 F.2d at 545, 548; *Fitzgerald*, 776 F.2d at 1243-1244; *Farnsworth Cannon, Inc.*, 635 F.2d at 281 (en banc) (per curiam).

The district court held that petitioner's claims depend upon his establishing that he had continuing contacts with government officials. Pet. App. 46a. The court concluded that "[s]ince the identity of those employees is privileged, [petitioner] will not have access to facts necessary to establish a genuine issue of material fact as to whether the alleged wrongdoers were, in fact, employees or agents of the government, nor has [petitioner] asserted that he can present a prima facie case even if the information were determined to be privileged." *Ibid.* The Director of Central Intelligence has asserted the state secrets privilege over the information petitioner needs to establish that the individual defendants are government officials. That assertion of privilege is fatal to petitioner's FTCA claim, which cannot succeed unless he can show that the intentional infliction of emotional distress he alleges was inflicted by a government employee. See *id.* at 45a-46a. For the same reason it is also fatal to petitioner's *Bivens* claim, which also requires a showing

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there may be matter, the production of which the court would not require, is certain." *Id.* at 37. The court of appeals appropriately cited *Burr* as a historical root of the state secrets privilege. Pet. App. 14a n.4.

of action by government employees. See *id.* at 51a-53a.

The district court considered whether alternatives to dismissal were practicable that would have permitted the claim to go forward consistent with protection of the privilege, and held that dismissal was required. Pet. App. 42a-53a. The court determined that an *in camera* proceeding was "not a reasonable alternative in this case." *Id.* at 46a-47a & n.11. The court of appeals agreed that "the litigation cannot be tailored to accommodate the loss of the privileged information." *Id.* at 19a. Plaintiff and his counsel do not have the security clearance necessary to review the privileged information *in camera*. Cf. *Loral Corp.* v. *McDonnell Douglas Corp.*, 558 F.2d 1130, 1132 (2d Cir. 1977) (litigation between two cleared defense contractors was conducted in a closed courtroom under tight security procedures without a jury). If an *in camera* proceeding on the merits were conducted *ex parte*, the court would be deprived of the benefit of the adversarial presentation of issues. Dismissal is warranted "when no amount of effort and care on the part of the court and the parties will safeguard privileged material." *Fitzgerald*, 776 F.2d at 1244. In this case, the lower courts reasonably concluded that dismissal was the only practicable means of protecting the privilege.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1996